Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment:)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	
)	

COMMENTS OF VERIZON AND VERIZON WIRELESS

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COMMENTS OF VERIZON AND VERIZON WIRELESS

Verizon and Verizon Wireless ("Verizon") applaud the Commission's focus in its *Notice*¹ on the challenges providers face with respect to wireless tower siting and the use of public rights-of-way. When localities² intentionally or even unintentionally engage in conduct that causes obtaining permission to deploy or to upgrade service to be time-consuming or costly or both, providers and consumers alike in those localities suffer. And such conduct directly hinders the accomplishment of the Commission's oft-stated goals of widespread broadband deployment that is affordable for consumers. As a result, the Commission should take immediate action to start to remove these impediments.

In particular, local ordinances often impose a number of hoops that providers must jump through before they can upgrade service even where a tower or other such facility has previously been approved. In these instances, providers typically need only to add or change antennas to deploy upgraded broadband services (such as LTE) and do not need to expand or otherwise

¹ See Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, Notice of Inquiry, 26 FCC Rcd 5384 (2011) ("Notice").

² Verizon refers to "localities" because local governments typically control public rights-of-way. However, certain state agencies may also control the rights-of-way. Section 253(a) applies equally to any "State or local legal requirement."

materially modify the underlying facility that supports the antennas. But these types of activities simply do not implicate the core "zoning" interests that Congress preserved for localities to address, and are very different in nature from proposals to materially modify the underlying tower or building, such as by substantially increasing the height of an existing tower or by erecting a second tower at the same location. To facilitate the rapid deployment of broadband services in these circumstances, the Commission should declare that these types of activities do not fall within the range of local zoning functions preserved by the Act and do not require local zoning approval where the underlying tower or other such facility was previously approved. In addition to adopting an authoritative construction of the statute to this effect, the Commission can also promote broadband deployment by issuing a policy statement making it clear that subjecting such activities to extensive application and review processes is contrary to the Commission's broadband goals, and by promoting the establishment of model zoning ordinances and supporting legislative initiatives that would confirm that extensive local reviews are not necessary in these circumstances. Furthermore, the Commission should work with other federal agencies to minimize delays for wireless facilities siting projects caused by environmental reviews and to standardize processes and fees for siting wireless facilities on Federal lands.

Broadband providers encounter similar impediments to their installation of wireline broadband facilities. Any provider that wishes to install broadband facilities in public rights-of-way, or to renew its license to use such facilities, must first get permission from local authorities. While many localities negotiate reasonable rates, others require rates (or impose other costs) that are unreasonably high. This abuse, particularly in the form of excessive fees, appears to be increasing in recent years as the country's economic woes have had a detrimental impact on

localities' budgets. Providers are often stuck in the untenable position of having to acquiesce to the localities' demands or forgoing deployment altogether. Verizon has made both choices in recent years.

Since November 2009, the Commission has had before it a means by which it could stop the abuse and provide guidance to localities concerning the right-of-way fees they can lawfully charge: Level 3's petition for a declaratory ruling.³ The Commission should rule on that petition and make clear that § 253 requires that right-of-way fees be based on the cost to localities of managing the right-of-way and be non-discriminatory. Any further delay in Commission action, including delays stemming from the instant proceeding, will simply result in more harm to providers and ultimately to consumers. In addition to ruling on the Level 3 Petition, the Commission should encourage states and localities to adopt best practices and, where appropriate, to enact state legislation that removes many of these impediments to broadband deployment.

³ See Level 3 Communications, LLC Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253, WC Docket No. 09-153 (July 23, 2009) ("Level 3 Petition").

DISCUSSION

I. THE COMMISSION SHOULD HELP REMOVE OBSTACLES TO THE WIRELESS FACILITY SITING PROCESS.

A. The Commission Should Take Additional Action To Speed the Wireless Permitting Process.

The Commission seeks comment on the extent to which the *Shot Clock Ruling*⁴ has been effective in reducing delays in the local zoning process.⁵ It also seeks information regarding site permitting timelines and, in general, on any wireless facilities siting issues that have an impact on broadband deployment and adoption.⁶ While, as discussed below, the *Shot Clock Ruling* has been effective in eliminating some delays in the local zoning process, other problems persist that delay wireless facilities siting. These include the proliferation of zoning ordinances that implement burdensome processes; unjustifiable requirements and fees on wireless facilities; and the need to complete the full local zoning process even when proposing to collocate facilities on existing towers or structures, even when such facilities will have negligible, if any, visual or other impact on the community.

1. The Shot Clock Ruling Has Been Effective in Reducing Some Delays in the Local Zoning Process.

The *Shot Clock Ruling* has been an effective tool in reducing some of the prolonged delays in the local zoning process, however, delays still persist. In Verizon's experience, the shot clock has been helpful in three ways. First, the existence of the shot clock has worked to

⁴ Petition for Declaratory Ruling To Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, 24 FCC Rcd 13994 (2009), Order on Reconsideration, 25 FCC Rcd 11157 (2010), appeal docketed, No. 10-60039 (Fifth Circuit Jan. 21, 2010).

⁵ See Notice, ¶ 13.

⁶ See Notice ¶¶ 14-15, 24-25, 29-33.

prevent local zoning authorities from being unresponsive to requests to move projects forward.

The possibility that an applicant will file a complaint after the applicable time period has lapsed if the jurisdiction is unresponsive has generally worked to improve communication between local jurisdictions and applicants.

Second, the shot clock has been effective in fostering more cooperative relations between local jurisdictions and carriers. The fact that local jurisdictions and carriers can agree to extend the shot clock time periods in many cases creates a cooperative dialogue between the applicant and the zoning authority – one that may help to avoid litigation. Carriers are generally willing to grant such extensions if it appears that the local jurisdiction is making steady progress towards acting on the zoning application.⁷

Third, the shot clock has been very effective in establishing determinable deadlines for when applicants must file court complaints seeking to enforce § 332(c)(7)(B) of the Act.

Applicants would prefer to work with local zoning authorities to have decisions rendered in a reasonable period of time, rather than pursue court action. Filing such complaints is costly, risky, and potentially damaging to relationships with local authorities. For these reasons, filing court complaints is a last resort. To date, Verizon has only filed five shot clock complaints.

2. The Commission Should Work with Stakeholders To Provide Guidance for Uniform and Streamlined Facilities Siting Practices in Local Jurisdictions.

While the *Shot Clock Ruling* has been effective at reducing some delays, the Commission should take steps to end delays caused by unreasonable local wireless facilities siting ordinances.

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⁷ For example, in Verizon Wireless' Northeast Area, there are currently six applications pending where Verizon and the local jurisdiction have agreed on one or more extensions of the shot clock time periods. In California, Verizon Wireless has agreed to extensions on at least 25 occasions.

Increasingly, local jurisdictions have hired consultants to help them draft new wireless facilities siting ordinances. These consultants purport to understand the law pertaining to wireless facilities siting and craft ordinances designed to "protect communities" without violating the limitations in § 332(c)(7)(B) of the Act. At the same time, these consultants often review complex technical engineering and legal documents without having the requisite expertise to do so. These ordinances generally require special use permits for all wireless facilities applications, making no distinctions between new towers, collocations on existing structures, or modifications of existing antennas. They also tend to impose higher application fees and onerous set-back requirements that make siting in many areas impossible. Other requirements include the posting of performance bonds and unreasonable escrow deposits to cover the costs of consultants hired by the locality to review the application and advise the locality. Oftentimes, the consultant hired and paid by the locality pursuant to the provisions of the ordinance is the very same consultant that helped draft the ordinance.

These consultant-driven local zoning ordinances have imposed significant additional costs on wireless carriers and created significant delays in the wireless facilities siting process.¹¹

⁸ *See*, *e.g.*, Megan Burrow, "Counsel considering independent consultant to draft cell tower ordinance," NorthJersey.Com, Oct. 20, 2010, http://www.northjersey.com/topstories/oradell/105352398 Council considering independent consultant.html.

⁹ See T-Mobile Ne. LLC v. The Incorporated Village of E. Hills and the Zoning Bd. of Appeals for the Incorporated Village of E. Hills, 2011 U.S. Dist. LEXIS 29815, *32-34 (March 22, 2011) (village consultant acknowledges he is not a licensed engineer, architect, certified planner, appraiser, or qualified as a radio frequency engineer, and the Court held his opinions did not constitute substantial evidence).

¹⁰ See, e.g., Colonie, NY Ordinance, Chapter 189, Colonie Town Code, Local Law No. 12, http://www.colonie.org/attorney/Recently%20Adopted%20Legislation/LL12of2009.pdf (2009) ("Colonie Ordinance").

¹¹ One consultant advertises that its model ordinance has been used by more than 2,000 communities.

While wireless carriers and industry trade associations have tried to lobby against such ordinances, those efforts are often portrayed as biased and contrary to the locality's interest and therefore unsuccessful. The Commission can and should help to stem the tide against ordinances designed to make wireless facilities siting more difficult, costly and time-consuming. In particular, the Commission should work with local governments, tower companies, and the wireless industry to craft a more balanced model zoning ordinance – one that protects the interests of the localities while streamlining local processes to allow for efficient siting of facilities. Such an ordinance would benefit local governments by limiting the public resources needed to conduct reviews that may not be necessary or relevant in all cases, while providing carriers and tower owners a more uniform and predictable process. The Commission should then educate local zoning authorities about the benefits of adopting the model ordinance.

3. The Commission Should Support Streamlining or Eliminating the Local Zoning Process to Add or Upgrade Antennaes on Existing Structures that were Previously Approved.

As discussed above, many zoning ordinances, particularly those drafted by third party consultants, make no distinction between making material modifications to existing structures, such as by adding a second tower at a given location or by significantly increasing the height of an existing tower, and merely adding or upgrading antennas that carriers mount on existing towers or buildings. As a result, these ordinances make no distinction between true modifications to a tower structure or facility, versus improvements needed to provide additional high-quality wireless service, such as upgrading old antennas to provide more capacity or to implement new broadband technologies, reorienting antennas to meet changes in demand in the area served by the tower, or replacing cable. None of these changes involve the types of changes that implicate core "zoning" concerns, which are focused on issues such as the location of

structures in the rights-of-way or other key attributes of those structures such as the number or height of towers erected. As a result, in a growing number of cases, minor activities such as the addition of new antennas to an existing structure or other activities that do not effect any material change in the underlying structure must go through the same rigorous and time-consuming local zoning process as a new tower.¹²

For example, in the Town of Colonie, New York, a town with a consultant-drafted zoning ordinance, Verizon, in order to upgrade its existing antennas to 4th Generation LTE antennas, was required to file seven applications to modify its existing antennas at seven sites. Pursuant to the ordinance, each application required a pre-application meeting with site visit, followed by a public hearing process. Each application also required an \$8,500 escrow deposit (required to pay for any work that the consultant that drafted the ordinance performed on behalf of the town to review the applications) and a \$3,500 application fee. Thus, Verizon had to pay the town up to \$84,000 simply to change out existing antennas to new LTE antennas.¹³ In each case, the new antennas will be of equal size or smaller than the original antennas. While the existence of the shot clock has helped get the reviews (four of the seven have been approved) approved in 49 to 74 days, the process for a simple antenna upgrade is overly burdensome, costly and time-consuming, particularly considering the minimal visual or other impact of the modifications.¹⁴

¹² See, e.g., Colonie Ordinance; Town of Stanford, NY Zoning Ordinance, Town of Stanford Code, Chapter 160, Wireless Telecommunications; Village of Woodbury, NY Zoning Ordinance, Village of Woodbury Code, Chapter 310, Zoning; Richmond, CA Wireless Communications Facilities Ordinance, Richmond Municipal Code § 15.04.890.010 et seq.

¹³ Verizon has not yet settled with the town on the amount of the escrow funds actually paid to the consultant, but it is likely that a portion of the escrow funds that were not used will be reimbursed.

¹⁴ In one case, The Colonie Town Building Department indicated to Verizon that it was inclined to exempt the changeout of antennas from the special use permit application process. However, the consultant and town attorney were able to convince the Building Department Manager to

In another situation, in Hamilin, New York, with yet another consultant-drafted zoning ordinance, Verizon ultimately abandoned a project that would have resulted in an upgrade of existing antennas to LTE after losing a battle with the town to have the upgrade declared not to be a substantial upgrade to the existing tower. By declaring the project a substantial modification, the town would have required Verizon to undergo the full special permit process, requiring hearings, consultant's fees, and special use application fees. Instead of capitulating to the town's demands, Verizon withdrew the application. The town's actions in this case prevented broadband deployment.

In North Roessleville, New York (a hamlet in the Town of Colonie), Verizon began negotiating a lease with the town in February 2008 to mount an antenna on an existing water tank with no height increase to the tank. To date, the consultant has exhausted almost all of the \$8,500 escrow deposit and Verizon has not yet been able to file the zoning application.

These are just a few of the many examples of unreasonable delays, overly burdensome processes, and unreasonably high fees that Verizon regularly experiences in trying to upgrade antennas to new broadband technology or deliver new or upgraded broadband service to communities. These processes slow, or in some cases, prevent carriers from bringing wireless broadband services to communities, and increase the cost of wireless broadband services. And they do so even though the underlying structure has previously been approved, and adding or upgrading an antenna does not implicate the core zoning interests of localities that Congress sought to preserve.

To help stem the tide of these increasingly burdensome application processes in these circumstances, the Commission should declare that adding or upgrading antennas on existing

subject the changeout to a full review, which included the escrow payment and employing the consultant to review the application.

towers or other structures that do not result in a material modification to the underlying structure do not constitute the "construction or modification of personal wireless service facilities" for purposes of Section 332(c)(7)(A) of the Act. Congress' objective to preserve local zoning authority did not permit localities from using that authority to reach any and all improvements to a previously authorized site, any more than such ordinances require a home owner to obtain a variance to replace their windows with more energy efficient upgrades or to install a new door. The problem is particularly acute at this time since carriers must upgrade the equipment on existing towers to provide the very kinds of high-speed, advanced wireless services that the Commission and Congress have encouraged. Such a ruling would advance the Commission's goals in fostering broadband deployment.

Second, in addition to adopting an authoritative construction of the statute, the Commission should adopt a policy statement finding that invoking the extensive zoning application and review processes in these circumstances is contrary to Commission's goals of fostering broadband deployment. Third, the model zoning ordinance discussed above should specify that collocations and antenna upgrades that do not effect a material modification of the underlying structure, such as by substantially increasing the size of the tower¹⁶ or otherwise have a substantial visual impact to the community (such as an antenna mounted in an existing church steeple) do not require state or local zoning approval. ¹⁷ Fourth, the Commission should support

¹⁵ 47 U.S.C. § 332(c)(7)(A).

¹⁶ To determine whether a substantial increase has occurred, the model ordinance should use the criteria adopted by the Commission and other signatories to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. 1, Appendix B at Section I.C.

¹⁷ In this regard, Verizon notes that some states, including North Carolina (2007 N.C. ALS 526; 2007 N.C. Sess. Laws 526; 2007 N.C. Ch. 526; 2007 N.C. SB 831); Tennessee (2005 Tenn. ALS 373; 2005 Tenn. Pub. Acts 373; 2005 Tenn. Pub. Ch. 373; 2005 Tenn. HB 2182) and Georgia (Ga. Code Ann., Title 36, Chapter 66B), have recently enacted or amended State laws to mandate a streamlined zoning process for collocations and modifications. The Commission should

legislative initiatives to confirm that local zoning authority does not reach these circumstances and that local zoning authorities cannot require providers to go through a permitting process and cannot refuse permission. Verizon notes, in this regard, that there is currently language in Section 528 of the draft Public Safety Spectrum and Wireless Innovation Act (PSSWIA) that would require state or local governments to approve "any eligible facilities request for a modification of an existing wireless tower that does not substantially change the physical dimensions of such tower." This would confirm that approval is not required either for changes to the underlying tower itself that do not result in a substantial change to the physical structure, and would also reinforce that approval is not required for lesser activities such as adding or upgrading antennas on existing towers. The Commission should endorse enactment of this specific provision of the PSSWIA.¹⁹

B. The Commission Should Work with the United States Fish and Wildlife Service To Improve Response Times and Standardize Reviews.

Another frequent source of delays and other obstacles for wireless facilities siting projects are environmental reviews conducted by the United States Fish and Wildlife Service (USFWS), particularly in California and Hawaii. Applicants must consult with the local USFWS office when environmental reviews conducted by the applicant reveal the possible presence of threatened or endangered species, critical habitats, or migratory birds in the project area. As the Commission develops rules to protect migratory birds, the frequency of reviews by USFWS will increase. When a project requires USFWS review, the project cannot proceed until the USFWS

support these types of laws in its policy statement and include similar provisions in its model ordinance.

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 $^{^{18}\,}$ S.911, 112th Congress, 1st Sess. § 528(a) (2011) ("S.911").

¹⁹ Verizon's endorsement of this particular provision of the PSSWIA should not be read to infer endorsement of other provisions of that draft bill.

has issued a finding of no impact to the environment, or if it finds a potential threat, until an environmental assessment is filed and USFWS issues a finding of no significant impact. In many cases, the USFWS will seek to mitigate the potential impact to the environment by seeking changes to the project or by asking the applicant to contribute a seemingly arbitrary amount of money to a fund to protect species or preserve critical habitats. Once the mitigation has occurred, the USFWS will typically clear the project to proceed.

Increasingly, particularly on projects submitted to USFWS locations in California and Hawaii, Verizon has experienced long delays in response times from the USFWS, requests for studies that delay the project by up to two years, and environmental concerns that do not appear to be based on sound scientific evidence. For example, in northern California, Verizon has recently experienced delays of 18 months or more on five projects where consultation with USFWS was required. Common problems encountered with these projects include long periods without a response, multiple requests for more information from USFWS long after Verizon submitted its request, projects having to begin anew when re-assigned to a different agent, and multiple layers of required review.

In Marin County, California, a site located on previously developed land (a golf course) experienced a delay of 17 months over concerns about the impact of radio frequency emissions (RFE) to the endangered Red Legged Frog. The USFWS had previously approved the site, but Verizon had to re-submit it to USFWS when a zoning change required Verizon to move the site by eight feet. When re-submitted, the USFWS agent raised the RFE impact issue, apparently based on a five-year old study by a Spanish scientist found on the Internet. In the end, the company paid \$38,500 to mitigate the concern before the project could proceed.

In Hawaii, the company has experienced requests for migratory and/or endangered bird studies and mitigation efforts. USFWS has not standardized these studies and mitigation requests; they vary greatly from project to project. As a result, Verizon has no way to determine how long the review will take or how much it will cost to mitigate any environmental concerns. In one case, in late 2007, the USFWS office in Hawaii determined that a new tower project might affect an endangered bird species. The USFWS requested two radar studies to determine the number of birds in the area. These studies cost \$64,000. Once submitted, the USFWS requested a formal consultation with the FCC in late 2009. The FCC sent a letter to USFWS on August 2, 2010 initiating the formal consultation. The USFWS responded on August 31, 2010 requesting additional information that was needed prior to initiating formal consultation. The FCC sent the requested information on March 28, 2011. USFWS initiated formal consultation one month later. The USFWS submitted its Biological Opinion to the FCC on July 7, 2011. The Biological Opinion recommends the following mitigation and conservation measures: (1) monthly carcass searches and annual report on findings; (2) \$50,000 mitigation payment to be used for seabird recovery program: (3) 24-hour notification requirement upon the discovery of a downed bird; (4) development of a Habitat Conservation Plan; (5) working with the USFWS to research and develop bird deflectors; (6) supporting research to improve survey efforts; and (7) assisting with efforts to minimize impacts from communication towers. The USFWS also directed that if the incidental take exceeds six birds during the 20-year life of the tower, reinitiation of consultation is required.

Verizon understands the need to consult with the USFWS for reviews of projects presenting a possible threat to threatened and endangered species, migratory birds and critical habitats. Verizon's concern is that the lack of standardized response times, mitigation efforts, or

review standards are increasingly resulting in unreasonable delays and mitigation efforts which result in delays in bringing broadband and other wireless services to the public and increasing the costs of such services. To address these costs and delays, Verizon requests that the Commission work with the USFWS to identify low-risk projects that can bypass the need for USFWS consultation. For projects that require USFWS consultation, the agencies should work to establish reasonable timelines for USFWS reviews – such as the 30-day timeline for state historic preservation officer and tribal reviews. The Commission should also work with USFWS to require that concerns raised be based on sound and accepted scientific evidence and to standardize reviews and mitigation efforts for common types of projects – such as migratory bird impacts.

C. The Commission Should Work with the Administration to Standardize Processes and Fees for Siting Wireless Facilities on Federal Lands.

Verizon frequently encounters delays and other problems when attempting to place sites on federal lands. Such problems include the lack of consistent processes within the various federal agencies relating to tower siting requirements on federal lands, various layers of approvals within the agencies which result in slow response times or additional requests for information or studies, problems negotiating leases for siting on federal lands, lack of an identifiable point of contact to drive the agency response, and non-cost-based fees. These issues have extended timeframes for wireless broadband and other services deployment by years, increased the costs of providing service, and caused some of Verizon's regions to avoid attempting to site facilities on federal lands altogether.

For example, Verizon Wireless' Southwest Region, which frequently must site on Bureau of Land Management, United States Forest Service or National Park Service lands, reports that

new leases to locate on such lands typically take two to three years to negotiate, and twelve to eighteen months to renew.

Verizon Wireless has been trying since 2002 to site a wireless telecommunications facility along the I-64 corridor, and adjacent to a high voltage transmission lattice tower and line, within the George Washington and Thomas Jefferson National Forests in Alleghany County, Virginia. On November 4, 2010, Verizon filed a complete application to site the facility, which will also include antennae to service customers of AT&T and NTELOS. The 2010 SF 299 was the second application submitted (a prior application was filed in 2008) and represented eight years of communication and consultation with the Forest Service, including multiple efforts to get clarification as to the submission requirements. Throughout this period, Verizon has tried earnestly to address myriad Forest Service concerns and issues, and to provide all information and documentation requested by the Forest Service. Despite continued good faith efforts to address these matters, Verizon is still unable to secure from the agency the necessary permit.

Several of Verizon's regions have reported problems in siting facilities on military bases. Problems encountered include above market rates for leasing land, required submission of projects to the Joint Spectrum Command for radio frequency study and analysis – a process that takes six months to a year to complete and costs several times more than similar studies conducted in the private sector – and unclear and overly-bureaucratic processes.

Most of the problems associated with siting wireless facilities on federal government lands can be attributed to lack of consistent processes, fees and the shortage of personnel available to drive projects to completion. These problems could be addressed by developing a standardized lease agreement with cost-based fees for the siting of wireless facilities, and standardizing siting policies and practices across all federal agencies. Standardized siting

practices among federal agencies would help to speed the siting process. Presumably, such practices and policies would also reduce the administrative burdens on federal agencies that may lack the resources to deal with wireless siting requests. The draft PSSWIA also contains provisions that would require the Government Services Administration to develop a common application form, establish cost-based fees for an easement or rights-of-way application for wireless antenna structures and backhaul facilities, and establish master contracts for the placement of wireless facilities on buildings and land owned by the federal government.²⁰ The Commission should endorse these draft provisions or otherwise work with the Administration to adopt such standardized practices, forms and fees.

II. OBSTACLES ASSOCIATED WITH PROVIDERS' ACCESS TO PUBLIC RIGHTS-OF-WAY ARE A SIGNIFICANT AND GROWING PROBLEM.

A. Localities Engage in Various Practices That Impede Providers' Access to Rights-of-Way.

Most localities' right-of-way policies are reasonable and do not materially impact

Verizon's decision to deploy facilities. But a number of localities abuse their authority over

public rights-of-way, which thus impedes broadband deployment. Some localities require

providers that wish to install broadband facilities in public rights-of-way to pay high right-ofway, registration, or other fees. Other local regulation – such as application, inspection, bonding,
and indemnity requirements – can also result in unreasonably high compliance costs. When

these local actions make it more expensive to deploy broadband facilities, they make it less likely
that providers will build such facilities in the area. In some cases, providers may have little
choice to leave the market and must accede to local demands, thus diminishing financial
resources that could have been used to improve service or deploy new facilities elsewhere.

²⁰ S.911, § 528(b) and (c).

Localities' abusive regulation of rights-of-way access can generally be categorized in the following manner:

Excessive Fees. The most common financial burden imposed by localities is a right-of-way fee. Localities typically base right-of-way fees either on the provider's per-foot usage of the right-of-way or a percentage of the provider's gross revenue generated in the particular locality. In some localities, providers pay flat fees (i.e., fees not tied to the amount of use or percentage-based fees) for requirements, such as an application, permit, inspection, and/or maintenance.²¹ Localities usually assess right-of-way fees annually, and many fees increase automatically with inflation.

Regardless of how they assess the fees, localities may abuse their control over rights-of-way access by imposing excessive fees. With the downturn in the U.S. economy over the past few years, many localities are experiencing severe budget shortfalls and are thus increasingly viewing communications providers as a key source of revenue. Verizon has observed that rights-of-way fees are routinely increasing – even in localities where they were not excessive to begin with. For example, since the beginning of 2011, certain localities in Oklahoma and Washington have sought to increase their rights-of-way fees by *five* times: from \$1 per foot to \$5 per foot. The timing of these local budget challenges and their deleterious effect on rights-of-way fees coincides – and directly conflicts – with the Commission's push for broadband deployment and adoption.

In fact, from a cost perspective, right-of-way fees should be decreasing, rather than increasing. The locality incurs the majority of its costs during the permitting and construction phases of a project. During the permitting phase, the locality will review plans, insurance, and

Fees may also be a combination of flat and variable fees. For example, in a locality in New Jersey, providers must pay an application fee plus a per foot fee.

application information. During the construction phase, the locality will monitor construction impacts and ensure the restoration of the rights-of-way. Once these two phases are complete, managing the use of the rights-of-way requires little – or even no – oversight by the locality. Nevertheless, fees routinely increase post-installation, often under the guise of municipal activities that localities would have to do anyway and that are unrelated to the provider's presence, such as the fees for mowing grass and the removal of roadkill or litter that one locality in Oklahoma imposes on Verizon.

Over the years, Verizon has encountered numerous examples of excessive right-of-way fees. For example, in 2002, the New York State Thruway Authority (NYSTA) – the same entity whose fees form the basis for the Level 3 Petition – required Verizon²² in particular to pay \$24,000 to occupy just 19 feet of public rights-of-way along the Thruway. Adjusted for inflation, the annual fee now exceeds \$33,000. As part of the agreement, NYSTA also required Verizon to donate two of the eight ducts it constructed in the rights-of-way.

Similarly, the Kansas Turnpike Authority charges Verizon excessive fees for the limited use of the right-of-way. Verizon must pay three percent of its annual revenues derived from traffic using its wireless network that operates along 47.5 miles of the Turnpike's rights-of-way. The Kansas Turnpike Authority also required Verizon to make an up-front payment of nearly \$1 million in 2002 to sign the contract.

The City of Eugene, Oregon provides yet another example of a locality that has imposed excessive right-of-way fees. Verizon installed facilities in private railroad rights-of-way in Eugene. Eugene asserted that, where the railroad tracks cross public streets, any underground

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The permittee was MCI Communications Services, Inc. ("MCI Communications"), now d/b/a Verizon Business Services. MCI Communications is the successor to MCI WORLDCOM Network Services, Inc., the original permit holder. MCI Communications is now owned by Verizon. In these comments, the term "Verizon" includes MCI Communications.

facilities are in public rights-of-way. Even if Eugene's position were correct, Verizon occupied less than 1,000 linear feet of public rights-of-way in the City and imposed no cognizable burden on the public rights-of-way. In 1991, Verizon and Eugene entered into a 15-year agreement that required Verizon to pay a total of \$2,300—about \$250 per year, present value—for the purported use of Eugene's public rights-of-way. While Eugene agreed that the fee was "adequate compensation," once the agreement expired, Eugene sought to apply an ordinance requiring any provider occupying *any* portion of public rights-of-way to pay an annual license fee of seven percent of the revenue derived from the services it provided in Eugene. In addition, the ordinance imposed an annual registration fee equal to two percent of the providers' revenues. Verizon paid more than \$81,000 for its initial two percent registration fee in 2006. If calculated in one manner, the additional seven percent right-of-way fee would have required Verizon to pay another \$286,000 – a total of more than \$360,000 in annual local fees, or more than 1,000 times the fee it paid under the previous agreement.

These sorts of unreasonable right-of-way fees are analogous to the unreasonable franchise fees imposed by some local franchising authorities (LFAs) on cable providers. The Commission found that unreasonable financial demands by LFAs, such as large up-front payments and in-kind contributions, threatened competition and technological development in the provision of wireline cable service.²⁶ The Commission concluded in this proceeding that

²³ See City of Eugene, OR Ordinance No. 20083, § 3.415(2).

²⁴ *Id.*, § 3.415(1).

²⁵ Verizon is currently disputing the fee calculation methodology with Eugene.

²⁶ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 43–44 (2007) ("621 Order").

unreasonable demands by local authorities "constitute[d] an unreasonable barrier to entry that impedes the achievement of the interrelated Federal goals of enhanced cable competition and accelerated broadband deployment." In particular, unreasonable demands, coupled with unreasonable delays, "discourage[d] investment in the fiber-based infrastructure necessary for the provision of advanced broadband services." The same risks exist in this context as well.

Providers usually have little choice but to submit to costly local requirements, either when they install new facilities or when they seek to renew expiring licenses. For example, carriers that have already sunk a large investment into a network face a Hobson's choice: either abandon their investment, or pay whatever fees the locality demands. In these situations, the carrier must accept nearly any local demand unless the Commission or the courts restrain local authority.

Localities also can coerce carriers into paying outlandish fees by delaying negotiations, leaving sunk investments stranded until carriers accede to their demands.²⁹ Commission staff has found that "delays of up to 18–24 months [in obtaining right-of-way permits] can also raise cost of fiber deployment."³⁰ The Commission also found that LFAs were using similar delay tactics to coerce cable operators into accepting unreasonable demands in the cable franchising context. Localities often subjected applications to "months of unnecessary delay."³¹ The Commission found that these delays, coupled with unreasonable demands, deterred competition

 $^{^{27}}$ *Id.* ¶ 1.

²⁸ *Id*. ¶ 3.

²⁹ See, e.g., TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002) ("[T]he extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays.").

³⁰ See National Broadband Plan presentation slides, September Commission Meeting, http://transition.fcc.gov/openmeetings/092909slides.pdf, at 50 (2009).

³¹ Section 621 Order ¶ 19.

in the provision of cable services. Accordingly, it adopted rules that preempted local abuse in the local franchising process.³²

Discriminatory Treatment. Localities may also abuse their control over public rights-of-way by favoring some providers over their competitors. Discriminatory fees make fair competition impossible and interfere with the Commission's goal of encouraging competitors to deploy facilities. In Eugene, for example, the incumbent local exchange carrier (ILEC) is not subject to the same fee requirements as Verizon, despite its significantly greater use of the City's public rights-of-way. While the ILEC may pay a total amount that is greater than what Verizon pays due to the amount of its revenues, Verizon is subject to both a higher percentage that is applied to a broader base of revenue than the incumbent carrier.

Specifically, § 221.515 of the Oregon Revised Code states that taxes imposed by municipalities on "every telecommunications carrier" for using public rights-of-way "may not exceed seven percent of the gross revenues." Under the definition of "telecommunications carrier" given by state law, the only "telecommunications carrier" in the City of Eugene is the ILEC, Qwest.³⁴ Under the definition of "gross revenue" that applies to "telecommunications carriers" under state law, the only revenues of Qwest on which rights-of-way fees can be based are those revenues "derived from exchange access services, as defined in [section 401.710 of the Oregon Revised Statutes,] less net uncollectibles from such revenues." Yet Verizon is subject to the aforementioned rights-of-way fees of nine percent (seven percent plus two percent annual registration fee) of revenues from all its services, both local and long distance.

 $^{^{32}}$ See id. ¶¶ 137-38.

³³ Or. Rev. Stat. § 221.515(1).

³⁴ See AT&T Commc'ns v. City of Eugene, 177 Or. App. 379, 387-88 (2001); Or. Rev. Stat. §§ 133.721(8) & 759.005.

³⁵ Or. Rev. Stat. § 221.515(2).

Similarly, Greensboro, North Carolina has discriminatory fees. The ILEC does not pay for use of public rights—of-way for its local exchange networks, but competitive LECs must pay \$1.75 per linear foot. Although the fee structure is not discriminatory on its face, in practice, the ILEC pays no fees because it does not have a franchise for its local network, despite the city's Telecommunications Ordinance that states that no carrier may occupy public rights of way without having a franchise.³⁶ In 2011, Verizon attempted to work with the city to establish equal treatment before it deployed facilities. Verizon was unsuccessful and ultimately decided to route its facilities around Greensboro right-of-way to provide service to a customer.

Absence of Standard Application Process. In addition to excessive fees, localities may impose other requirements that make deployment more costly and burdensome. For example, some localities have no process in place for providing non-incumbent providers with access to rights-of-way. These providers may therefore be subjected to lengthy delays as they negotiate the first such agreement with the locality.

Without a standard application process, localities routinely come up with highly burdensome requirements that have little, if any, relation to the provider's use of the rights-of-way. For instance, in some localities, Verizon has been required to demonstrate financial qualifications and good standing and to provide customer data, proprietary service information, and corporate officer certifications of the accuracy of factual responses or of the authority to sign agreements on behalf of Verizon.

The approval process of such an agreement with a locality also may vary. The local authorities that manage rights-of-way may condition approval on the approval of other agencies or entities, thus imposing an additional burden on providers. These other agencies and entities

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³⁶ See Greensboro, North Carolina Code of Ordinances, Chapter 28.1, Article II, § 28.1-4 (1995).

could include environmental agencies, cities – even under circumstances where the county manages the right-of-way – or other providers if the project involves using existing conduit. For example, in California, one locality would not grant Verizon the right-of-way permit until Verizon obtained permits from a railroad and the California Department of Fish and Game for a project that just slightly traverses railroad tracks and a creek.

In-Kind Requirements. In exchange for access to rights-of-way, localities may require donations of equipment, network connectivity, services, or dark fiber. These requirements may be as costly – or even more so – as the excessive fees. For instance, as noted above, NYSTA conditioned Verizon's access to the right-of-way on Verizon's donation of two of the eight ducts it constructed in the rights-of-way. *See supra* p. 18.

Moreover, the City of Portland, Oregon required in-kind donations that allow it to compete with the donating provider. Portland operates a fiber-optic network and sells telecommunications services to public schools and other governments. Portland built the network in part by requiring in-kind contributions from private providers under permits or franchise agreements, which subsidizes the municipal network and allows it to undercut the providers with which it competes. In particular, Portland requires terms in its rights-of-way agreements that allow it to access surplus conduits, free of charge. And for new construction, Portland can notify providers if it wants conduit placed along side the providers' conduit; while the City would pay the incremental cost (for materials and labor) for that conduit, this amount represents only a fraction of the providers' actual construction costs.

³⁷ *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1089–90 (D. Or. 2006), *aff* 'd in part, 322 Fed. Appx. 496 (9th Cir. 2009).

³⁸ *Id*.

B. Excessive and/or Discriminatory Fees and Requirements To Access Rights-of-Way Have Impacted Verizon's Decisions Whether to Deploy Services.

The fees and practices discussed above have a significant impact on both providers and consumers. In many cases, as noted above, Verizon and other providers will have little choice but to accept the fees and other requirements that localities insist upon. Consumers may directly suffer if providers pass some or all of these excessive fees on to them. Yet consumers are harmed far worse when a locality's conduct causes providers to abandon plans to deploy broadband or other communications services in that locality. The absence of competition – and possibly the lack of any access to broadband services – has a significant impact on consumers.

In recent years, Verizon has been forced to make difficult decisions about whether to deploy facilities in light of localities' right-of-way requirements. In certain circumstances, Verizon has declined to pursue its deployment plans.

For example, as discussed above, the City of Eugene dramatically increased its right-of-way fees in 2006 to a percentage-based fee structure. Because the installation of facilities would have exposed Verizon to Eugene's seven percent annual right-of-way fee (and the two percent registration fee), Verizon's CLEC decided to suspend its plans to build new facilities to provide local service to a large customer in Eugene.³⁹ As a result, Verizon does not currently have its own physical network in Eugene.⁴⁰

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³⁹ MCI Communications and MCImetro challenged the seven percent fee in federal district court. The court determined that the Tax Injunction Act, 28 USC § 1341, barred a federal district court from hearing the challenge because the fee constituted a tax. *MCI Commc'ns Servs.*, *Inc. v. City of Eugene*, No. 07-6059-AA, 2007 U.S. Dist. LEXIS 75602, at *4-5, 2007 WL 2984118, at *3–4 (D. Or. Oct. 9, 2007), *aff'd* 359 Fed. Appx. 692 (9th Cir. 2009). Consequently, the court did not reach the merits.

⁴⁰ Verizon is currently reassessing its decision to determine whether certain offsets to revenue for purposes of the fee calculation would allow Verizon's deployment to make financial sense.

Similarly, Verizon has decided not to deploy fiber optic cable and conduit facilities in Leesburg, Virginia. In 2010, Verizon developed a plan to construct facilities through the Town of Leesburg. After Verizon approached the Town for use of its rights-of-way, the Town required Verizon to make an in-kind contribution – i.e., that Verizon place conduit for the Town. Despite Verizon's objections and the Virginia law that prohibits such conduct (see discussion *infra*), the Town would not relinquish its demand for a conduit. In part to avoid setting a precedent, Verizon abandoned its plan to deploy these facilities in Leesburg.

Moreover, localities in Alabama, including the major cities of Birmingham, Mobile, and Huntsville, require or are proposing to require providers to enter into franchise agreements and pay a percentage of gross revenue as a fee for using the public rights-of-way. Such requirements would ostensibly only apply to competing providers – not to the incumbent that has a statewide franchise. In 2008, Verizon approached Birmingham and Mobile with plans to build a physical network in those cities. But because of the differential treatment, Verizon decided not to deploy a physical network in these Alabama localities (though it does serve customers in Birmingham and Mobile by leasing services from other carriers).

III. THE COMMISSION SHOULD CLARIFY THAT § 253 PROHIBITS UNREASONABLE AND DISCRIMINATORY RIGHT-OF-WAY FEES.

As in the cable franchising context, the Commission should take immediate action to prohibit abusive local practices that impede the deployment of facilities and impair competition. Congress has expressed its intent in 47 U.S.C. § 253, and the Commission has previously interpreted § 253(a) as preempting local action that "materially inhibits or limits the ability of

any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

The Commission need only clarify what § 253 permits localities to charge for access to rights-of-way. And the Commission can do so by ruling on the pending Level 3 Petition. The time to act on this important issue is now, rather than standing by as broadband deployment is delayed while task forces study the issue or the various suggested approaches in the *Notice* are assessed and possibly implemented. Without any further delay, the Commission should declare that § 253 preempts local right-of-way fees if they are unreasonable – i.e., not based on the locality's cost to manage that access – or competitively discriminatory.⁴²

A. The Commission Has Authority To Interpret and Implement § 253.

Just as the Commission has authority to interpret and implement the provisions of Title VI, except to the extent the statute provides otherwise, so too it has authority to interpret and implement § 253. In its *621 Order*, the Commission considered the interaction between several specific provisions of Title VI, including the provision of § 621(a) concerning limits on local authority's power over franchising; the Commission concluded that § 621(a) prohibited LFAs from demanding excessive fees, imposing burdensome non-fee requirements, and engaging in unreasonable delay.⁴³ Although § 621(a) does not expressly address the Commission's role, the Commission concluded that its traditional authority to interpret and implement the express

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⁴¹ Cal. Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d), Memorandum Opinion and Order,12 FCC Rcd 14191, ¶ 31 (1997) ("California Payphone Order").

⁴² The Commission should make clear that discriminatory fees cannot be remedied merely by raising fees. Ultimately, the fee must also be reasonable and based on the cost of administering use of public rights-of-way by service providers.

⁴³ *621 Order* ¶ 1.

provisions of the Communications Act encompassed § 621(a).⁴⁴ The Sixth Circuit agreed.⁴⁵ It concluded that § 201 gives the Commission "clear jurisdictional authority" to interpret every provision of the Communications Act.⁴⁶ *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

Similarly, the Supreme Court held that § 201(b) gives the Commission power to interpret §§ 251 and 252: "Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934...the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions." The Court found no evidence that Congress had limited the Commission's authority to interpret and implement the express provisions of the Act in the context of the local competition provisions. The Court also found it unnecessary to determine whether § 251(d)⁴⁸ granted the Commission additional authority, as § 201(b) gave the Commission all the authority

⁴⁴ *See Id.* ¶ 56.

See Alliance for Cmty. Media v. FCC, 529 F.3d 763, 772–73 (6th Cir. 2008), cert. denied, 129
 S. Ct. 2821 (June 15, 2009).

⁴⁶ Alliance for Cmty. Media, 529 F.3d at 774.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377–78 (1999); see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, § 151 Hence, as we have in the past, we apply the Chevron framework to the Commission's interpretation of the Communications Act."); accord United States v. Sw. Cable Co., 392 U.S. 157, 173 (1968) (legislation "gave the Commission a comprehensive mandate with not niggardly but expansive powers") (internal quotations and citations omitted); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 235 (1994) (Stevens, J., dissenting) ("This Court's consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities.").

⁴⁸ "Within 6 months after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1).

it needed.⁴⁹ The Court rejected the contention that the provisions of the 1996 Act that specifically discussed Commission action impliedly limited the Commission's authority under § 201(b).⁵⁰ For example, the Court concluded that the inclusion of a mandatory provision did not diminish the Commission's discretionary authority to interpret or apply other provisions of the Act, unless the statute provides otherwise. The Court observed that § 251(e) "requires the Commission to exercise its rulemaking authority, as opposed to § 201(b), which merely authorizes the Commission to promulgate rules if it so chooses."⁵¹

The Commission has precisely the same authority in this case to interpret and harmonize the various provisions of § 253 to prohibit local requirements that materially inhibit or limit competition. As in the Title VI context, the Commission's authority to interpret § 253 necessarily includes the power to interpret, reconcile, and implement its various subsections. This authority applies to the Commission's evaluation of excessive or discriminatory right-of-way fees.

Section 253(d) provides an additional source of authority to prevent the enforcement of all local requirements, including right-of-way fees, that violate § 253(a). Section 253(d) states that "[i]f... the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

The Commission's authority under § 253(d) includes the power to prevent the enforcement of local impediments to competition, including right-of-way fees. There can be no

⁴⁹ See Iowa Utils. Bd., 525 U.S. at 383.

⁵⁰ *Iowa Utils. Bd.*, 525 U.S. at 383 n.9.

⁵¹ *Id*.

doubt that right-of-way fees are among the local actions restricted by § 253(a), as such fees *can* "materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." Otherwise, there would have been no need for Congress to save from preemption reasonable and non-discriminatory right-of-way fees in § 253(c). The whole purpose of a savings clause is to "save a specific subset of legal expressions *that would otherwise be preempted.*" 53

Because the Commission has the authority under § 253(d) to preempt the enforcement of a requirement that violates § 253(a), the absence of any reference in § 253(d) to § 253(c) does not affect the scope of the Commission's authority to prevent the enforcement of right-of-way fees. Section 253(c) is a savings clause, not a prohibition. As such, a right-of-way fee that falls outside the savings clause does not "violate" § 253(c), but instead violates § 253(a).

Accordingly, the fact that § 253(d) does not state that the Commission shall prevent the enforcement of a local requirement that "violates" § 253(c) is unsurprising and has no effect on the Commission's authority to prevent the enforcement of any local requirement, including a right-of-way fee, that violates § 253(a).

⁵² Cal. Payphone Order \P 31.

Wood v. Gen. Motors Corp., 865 F.2d 395, 420 (1st Cir. 1988) (emphasis added). See also Frank v. Delta Airlines, Inc., 314 F.3d 195, 199 (5th Cir. 2002) ("the narrow savings language implied a broad scope for federal preemption," or else the exception "would hardly have seemed necessary"); 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 20:22 (7th ed. 2009) ("Where the legislature has made specific exemptions, the courts must presume no others were intended. In interpreting a proviso, if the restrictive scope of the proviso is in doubt, the proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute." (footnotes omitted)).

Section 253(d) also states that the Commission shall preempt a requirement that violates § 253(b), which also appears to be a safe harbor. Although the reference to § 253(b) in this context is ambiguous, it does not divest the Commission of jurisdiction to determine that a local requirement violates § 253(a) simply because the subject matter of the requirement may also implicate § 253(c).

B. The Commission Has Already Decided That § 253 Preempts Local Actions That Materially Interfere With Any Carrier's Ability To Enter and Compete Fairly in the Telecommunications Market.

Under § 253(a), "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In its *California Payphone Order*, the Commission interpreted this provision to preempt action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

The Commission acted within its authority in adopting this interpretation of § 253.

Because the scope of § 253 is ambiguous, the Commission has discretion to interpret the statute as establishing a material inhibition standard. Section 253(a) blocks local actions that have the effect of "prohibiting" a carrier's ability to provide service, but it does not define the word "prohibit." The Commission reasonably construed "prohibit" in this context as meaning "hinder" or "inhibit." See, e.g., Black's Law Dictionary 1248 (8th ed. 2004) (defining "prohibit" as "to prevent or hinder"); Webster's Third New International Dictionary Unabridged 1813 (2002) ("hinder"); Random House Webster's Unabridged Dictionary 1546 (2d ed. 1998) ("hold back," "hinder," "obstruct"); 12 Oxford English Dictionary 2d 596 ("to prevent, preclude, hinder"). Indeed, the Supreme Court has used the verb "impedes" as a synonym for "prohibits" when describing the statute.

⁵⁵ Cal. Payphone Order ¶ 31.

 ⁵⁶ See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 499–500
 (1998) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

⁵⁷ Congress also indicated that the statute is broadly preemptive by precluding "any" state or local action that has the effect of prohibiting the ability of "any" entity to provide service. *See* Brief for the Federal Petitioners at 24, *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (Nos.

The Commission's construction of § 253 is entitled to special deference because § 253(d) expressly delegates to the Commission the authority to determine if a state or local requirement is preempted by § 253.⁵⁹ The First, Second, and Tenth Circuits have each accepted the *California Payphone Order* standard as a reasonable interpretation of § 253(a).⁶⁰ The Eighth Circuit also endorsed the material inhibition test from the *California Payphone Order*, though its application of that standard was ambiguous.⁶¹ The United States has argued that the Eighth Circuit's decision primarily endorsed the *California Payphone Order* and "need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry."⁶² The Ninth Circuit held that § 253(a) requires a carrier to demonstrate effective prohibition, but did not elaborate on how that standard could be met.⁶³ Regardless, the

02-1238 et al.), 2003 U.S. S. Ct. Briefs LEXIS 745, **19 (Sept. 8, 2003) ("any" indicates breadth outside special "clear statement" context).

⁵⁸ See Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 491 (2002).

⁵⁹ See Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1200–01 & n.9 (2009) JP to see if US published yet (citing 47 U.S.C. § 253(d) as example of direct congressional delegation of preemption authority); Brief for the United States as Amicus Curiae at 9, Level 3 Commc'ns, LLC v. City of St. Louis, 129 S. Ct. 2859 (U.S. May 2009) (Nos. 08-626 & 08-759) ("Moreover, the Commission can use its authority under Section 253(d) to help correct and unify the interpretation and application of Section 253....").

⁶⁰ See P.R. Tel. Co., Inc. v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006); TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002) ("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)."); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1269 (10th Cir. 2004) ("A regulation need not erect an absolute barrier to entry in order to be found prohibitive.").

⁶¹ See Level 3 Commc'ns, LLC v. City of St. Louis, 477 F.3d 528, 533 (8th Cir. 2007).

⁶² Brief for the United States as Amicus Curiae at 13, *Level 3 Commc'ns*, *LLC v. City of St. Louis*, 129 S. Ct. 2859 (U.S. May 2009) (Nos. 08-626 & 08-759).

⁶³ See Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 578 (9th Cir. 2008) (en banc).

Commission is not bound by judicial constructions of ambiguous language in its governing statute.⁶⁴

Under the *California Payphone Order* standard, the Commission can determine when a right-of-way fee "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." Section 253 does not speak directly to that question, and thus the Commission has discretion to conclude that right-of-way fees have a prohibitory effect when they are unreasonable or competitively discriminatory.

- C. The Commission Should Declare That § 253 Preempts Unreasonable and Competitively Discriminatory Right-of-Way Fees.
 - 1. Congress Struck an Appropriate Balance Between Local and Federal Interests by Preempting Unreasonable and Discriminatory Right-of-Way Fees.

The Telecommunications Act permits localities to regulate rights-of-way, subject to specific limitations. First, localities may "manage" public rights-of-way within their boundaries. 47 U.S.C. § 253(c). For example, localities may legitimately regulate the time of excavation to prevent traffic problems. 66 Other management functions include "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way

⁶⁴ Nat'l Cable & Telecomms. Ass'n, 545 U.S. at 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

⁶⁵ Cal. Payphone Order ¶ 31.

⁶⁶ See Classic Tel., Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082, ¶ 39 (1996) (discussing legislative history on the "permissible management functions" of a locality).

to prevent interference between them."⁶⁷ Second, localities may "require fair and reasonable compensation" for the use of public rights-of-way. *Id.* § 253(c). For example, localities can charge carriers for the costs incurred to issue permits or for other direct costs.

The Commission should adopt a standard that reflects the balance struck by § 253(c). Congress preserved local authority to manage rights-of-way and to demand reasonable compensation on a non-discriminatory basis. At the same time, Congress did not intend to allow localities to abuse their control of public rights-of-way by imposing fees that simply capture carrier profits or favor one carrier over another. As the Second Circuit has explained, "[s]ection 253(c) requires compensation to be reasonable essentially to prevent monopoly pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates." Likewise, wireless carriers cannot provide service without obtaining permits from local governments to install necessary facilities.

When they extract unreasonable fees, localities discourage competitors from entering the market, retarding the development and deployment of new broadband and telecommunications technology. Congress intended for market competition, rather than municipal officials, to determine the services available to consumers. The Commission should therefore declare that

⁶⁷ TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption, and Other Relief, Memorandum Opinion and Order, 12 FCC Rcd 21396, ¶ 103 (1997) ("TCI Cablevision Order").

⁶⁸ City of White Plains, 305 F.3d at 79.

⁶⁹ See 47 U.S.C. § 1302(a) (requiring the Commission to encourage the deployment of advanced telecommunications capabilities).

⁷⁰ See Silver Star Tel. Co., Inc. Petition for Preemption and Declaratory Ruling , Memorandum Opinion and Order, 12 FCC Rcd 15639, \P 38 (1997) ("Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers."); see also In re Pub. Util. Comm'n of Tex., et al. Petitions for

§ 253 prohibits local fees that are unreasonably high or exceed the fees charged to any other local competitor. And discrimination in fees cannot be remedied merely by raising fees and applying them to all providers. Instead, the remedy should be to lower all fees, and ultimately to ensure that fees charged to all providers are reasonable.

2. The Structure of § 253 as a Whole Shows That Congress Intended To Bar Unreasonable and Discriminatory Right-of-Way Fees.

Read as a whole, § 253 shows that Congress intended to prohibit unreasonable and discriminatory right-of-way fees. Congress explicitly addressed local authority over right-ofway fees in § 253(c). That section preserves localities' right to charge right-of-way fees so long as they are reasonable and imposed on a competitively neutral and nondiscriminatory basis. The most logical way to harmonize the statute as a whole, and to give effect to Congress's procompetitive objectives, is to construe § 253(a) as preempting any right-of-way fees that are not saved by § 253(c).

Some courts have found that § 253(c) may reasonably be interpreted to "operate as an independent source of claim," permitting providers to sue directly under § 253(c) when they are charged unreasonable or discriminatory fees.⁷¹ Even if § 253(c) is not preemptive in itself, the scope of the safe harbor informs the scope the prohibition under § 253(a). The clear implication of § 253(c) is that Congress did not want to allow localities to charge right-of-way fees that are

Declaratory Ruling and/or Preemption of Certain Provisions of the Tex. Pub. Util. Regulatory Act of 1995, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 4 (1997) ("PUC of Texas Order") ("Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states ").

⁷¹ P.R. Tel. Co., 450 F.3d at 20; e.g., TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000) (section "authorizes a private right of action in federal court for telecommunications providers aggrieved by a municipality's allegedly discriminatory or allegedly unfair and unreasonable rates").

unreasonable or competitively discriminatory—and therefore saved only those fees that are both "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c).

The Commission has previously looked to § 253(c) to inform the scope of the limitations under § 253(a). In the TCI Cablevision Order, for example, the Commission said that "[o]ne clear message from section 253 is that when a local government chooses to exercise its authority to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis."⁷² Indeed, Congress expressed its intent to preempt discriminatory right-of-way fees, which Congress thought were impeding fair competition.⁷³

Interpreting the statute as prohibiting fees not saved by § 253(c) is also a sensible application of the California Payphone Order standard to right-of-way fees. Localities create an unfair competitive environment when they impose unreasonable right-of-way fees or use those fees to discriminate against one carrier in favor of others. Both unreasonable and discriminatory fees are abuses of local control that discourage potential competitors from entering the locality and deploying broadband facilities. And when a locality does succeed in coercing a carrier to pay excessive fees, it reduces the provider's ability to improve service or deploy new facilities in

⁷² *TCI Cablevision Order*, ¶ 108 (emphasis added).

⁷³ See, e.g., S. Rep. No. 103-367, at 56 (1994) ("Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way."); H.R. Rep. No. 104-204, at 75 (1995) ("The purpose of [a competitive neutrality provision] is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity."). Other sections of the Telecommunications Act also underscore the importance of competitive neutrality. E.g., 47 U.S.C. §§ 253(b) (preserving state regulatory authority exercised "on a competitively neutral and nondiscriminatory basis"), 254(b)(4) (requiring carriers to make a "nondiscriminatory" contribution to advance universal service), 251(e)(2) (requiring costs of number administration be borne by carriers "on a competitively neutral basis").

that locality and elsewhere. These results conflict with Congress's intent, as expressed in the 1996 Act, to ensure that localities do not frustrate the federal goals of expanded access to broadband technology and greater competition in the telecommunications markets.⁷⁴

3. The Commission Should Articulate Clear Standards for Determining When Fees Are Unreasonable or Discriminatory.

The Commission should declare that right-of-way fees are unreasonable when they exceed the municipal expenses incurred because of a carrier's deployment of facilities in public rights-of-way. In addition, the Commission should declare that discriminatory fees are prohibited to the extent that they exceed the lowest rate charged to any competitor in the locality. In other words, the remedy for discriminatory fees should be to require localities to lower excessive fees, rather than allowing them to raise fees. Together, these tests give effect to Congress's objectives and advance broadband policies while providing administrable standards.

Right-of-way fees are reasonable only if they are closely related to the locality's costs of managing public rights-of-way incurred as a direct result of a carrier deploying facilities. For two reasons, localities may not simply charge the maximum rate carriers will agree to pay. First, localities manage the rights-of-way in trust for the benefit of the public, not as a private property owner entitled to seek profits.⁷⁵ Second, localities' ownership of the rights-of-way would allow them to impose inappropriate anticompetitive rates. In discussing the meaning of § 253 in its brief to a federal court of appeals, the Commission suggested that fees exceeding municipal costs

indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states ").

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[&]quot;To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."; *PUC of Texas Order*, ¶ 4 ("Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual

⁷⁵ See Liberty Cablevision of P.R. v. Municipality of Caguas, 417 F.3d 216, 221–22 (1st Cir. 2005).

or otherwise unrelated to carrier use would constitute unreasonable barriers to entry. The Commission cited a federal district court's conclusion that "a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry" That court reasoned that the most persuasive reading of "fair and reasonable compensation" is to limit fees to the "recoupment of costs directly incurred through the use of public rights-of-way." In other words, localities should not make a profit from their management of the rights-of-way.

Congress had in mind this simple idea of allowing localities to recoup costs when it passed the Telecommunications Act. For example, Senator Feinstein—a former mayor and strong defender of municipal rights who opposed preemption during the floor debate—expressed concern that local governments would not be able to recover "the costs of reviewing plans and inspecting excavation work," to collect "an appropriate share of increased street repair and paving costs that result from repeated excavation," and more generally to "protect[] the public's investment in infrastructure." States have also recognized the importance of linking right-of-

⁷⁶ Brief of the Federal Communications Commission and the United States as Amici Curiae at 15 n.7, *TCG N.Y.*, *Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2001) (Nos. 01-7213, 01-7255).

⁷⁷ *Id.* (quoting *N.J. Payphone Ass'n, Inc. v. Town of W. New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001)).

⁷⁸ *N.J. Payphone Ass'n*, 130 F. Supp. 2d at 638. Several courts have left open whether § 253 *requires* right-of-way fees to be limited to municipal costs, but none foreclose that conclusion. *E.g.*, *P.R. Tel. Co.*, 450 F.3d at 22 (1st Cir. 2006) ("We need not decide whether fees imposed on telecommunications providers by state and local governments must be *limited* to cost recovery."); *TCG N.Y.*, 305 F.3d at 79 (2d Cir. 2002) ("However, because the issues of whether 'reasonable compensation' can include gross revenue fees and, if so, what percentage of gross revenue may be exacted are difficult and not necessary to resolve this appeal . . . we decline to reach the issue."); *City of Santa Fe*, 380 F.3d at 1272–73 (noting disagreement about whether "fair and reasonable" should be measured by "the City's costs" but finding that fees failed "even the totality of the circumstances test").

⁷⁹ 141 Cong. Rec. 15,590, 15,591 (1995).

way fees to actual costs. For example, Governor Schwarzenegger of California signed an executive order requiring that "any charge to wired broadband providers for State ROW usage shall be based on the actual costs incurred by the State." Fees are unreasonable when they exceed the costs a locality incurs because of a carrier's deployment of facilities in public rights-of-way.

In determining whether a locality's right-of-way fees are cost-based, the Commission should compare those fees to the amounts charged by other localities – data that the Commission may be able to obtain from responses to its *Notice*. The fact that a locality's right-of-way fees substantially exceed those of other localities indicates that the locality's fees may exceed cost and be unreasonable. But while a fee that substantially exceeds prevailing rates is likely to be unreasonable, the converse is not true: a locality cannot justify its fees simply by pointing to similar fees charged by other localities, as this would simply encourage all localities to set unreasonable fees.

D. Section 706 Counsels in Favor of Interpreting § 253 as Barring Unreasonable and Discriminatory Right-of-Way Fees.

Congress emphasizes the importance of universal access to advanced telecommunications technologies in § 706 of the 1996 Act. In § 1302(a), Congress instructs that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using, among other tools, "measures that promote competition in the local telecommunications market, [and] other regulating methods that remove barriers to infrastructure investment." Section 706 counsels in favor of interpreting § 253 as barring local actions that have the effect of impeding investment in broadband

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⁸⁰ Twenty-First Century Government: Expanding Broadband Access and Usage in California (Revised), Exec. Order S-23-06, www.ca.gov (follow "Executive Orders" to "2006-November").

infrastructure, such as the backbone network in this case. Unreasonable and discriminatory right-of-way fees stand in the way of federal goals articulated in § 706.

V. THE COMMISSION SHOULD ALSO ENCOURAGE BEST PRACTICES THAT HAVE BEEN ADOPTED BY OTHER STATES.

While the Commission should act quickly on the Level 3 Petition, the Commission should also promote the adoption by localities of best practices pertaining to rights-of-way and/or state legislation that codifies such practices. As documented above, Verizon has encountered abuse of the right-of-way permitting process in a variety of ways by different localities. At the same time, certain states, such as Virginia, have been at the forefront of adopting laws and policies that support providers' efforts to further deploy their networks.

In 1998, the Virginia legislature passed legislation to standardize rights-of-way fees. Va. Code Ann. § 56-468.1. This legislation has the following key components that work together to protect providers from abuses and promote the deployment of network facilities:

First, the legislation replaced the patchwork of existing fees and charges associated with the use of the public rights-of-way – including proposed fees that ran as high as five percent of gross receipts plus reimbursement of all rights-of-way-related costs. In their place, the legislation created a Public Rights-of-Way Use Fee and explained how to calculate it: \$1.00 per foot for any new installation in the public rights-of-way in a given year plus \$250 per mile for each mile of roadway (other than interstate) in the Commonwealth, with the fee recalculated each year based on changes in the number of access lines and any new telecommunications construction in the public rights-of-way in the prior year. While the Commission should declare that § 253 allows localities to recover only right-of-way management costs, Verizon welcomes any independent state action prior to the Commission acting that moves fees from a percentage of revenue fee (which has no relation to management costs) to a reasonable usage-based fee.

Second, the Virginia statute prohibits the donation of in-kind services. Section 56-458(E) states that no locality can require a provider "to provide in-kind services or physical assets as a condition of consent to use public rights-of-way."

Third, this legislation prohibits discriminatory fees. No restrictions can be imposed on the telecommunications provider in its use of the rights-of-way that are greater than those imposed on other private users of the rights-of-way; *see* § 56-458(C).

Fourth, the statute eliminates unnecessary delays in the permitting process. Permit requests must be acted upon within 45 days. A written explanation must accompany any denial of a permit; *see* §56-458(D).

Fifth, the right-of-way fee is transparent to customers. The fee is collected through the monthly phone bill from the local customers of the providers of wired telecommunications services. The minimum monthly fee is 50 cents and the current fee, set based on the formula described above, is 83 cents. Economically disadvantaged customers who qualify for the Virginia Universal Service Plan will be exempt from the fee.

In addition to Virginia, other states have recently taken proactive steps to facilitate providers' access to rights-of-way. For instance, Texas and Florida do not require providers to enter into franchise agreements with a municipality or county for use of public rights-of-way. 81 California is even more accommodating to providers. If a telecommunications company has a statewide franchise issued by the California PUC, it may utilize public rights-of-way for installation of its facilities *at no charge*. 82

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⁸¹ See Tex. Local Government Code Chapter 283 (HB 1777); Fl. Stat § 202.10, Communications Services Tax Simplification Law, Chapter 202.

⁸² See Cal. Public Utility Code § 7901.

The record developed in this *Notice* should be sufficient to allow the Commission and other stakeholders to select the best protections from these states and compile a set of best practices for all states and localities to follow. Such action would complement the Commission's ruling on the Level 3 Petition and further remove today's impediments to broadband deployment.

VI. CONCLUSION

For the foregoing reasons, the Commission should facilitate cell tower siting and adopt rights-of-way standards consistent with these comments.

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